A

PP

v.

DATUK CONRAD MOJUNTIN & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CRIMINAL APPEAL NOS: K41-13-2008 & K41-14-2008]
8 JANUARY 2009

C ***CRIMINAL LAW:*** *Penal Code - Section 323 - Voluntarily causing hurt - Allegation of - Whether proved - Whether there was doubt that victim's black eye caused by respondents - Whether findings of trial judge should be set aside*

D ***CRIMINAL PROCEDURE:*** *Sentence - Penal Code, s. 323 - Voluntarily causing hurt - Factors considered - Sentence of fine - Whether sufficient punishment*

CRIMINAL LAW: *Penal Code - Section 506 - Criminal intimidation - Putting shotgun to victim's head - Whether proved - Whether a pure* E *display of aggression - Whether under no circumstances should weapons be used for unlawful purpose - Whether findings of trial judge set aside*

CRIMINAL PROCEDURE: *Sentence - Penal Code, s. 506 - Criminal intimidation - Factors considered - Sentence to be effective deterrent*

F Both the respondents were jointly charged under s. 323 of the Penal Code (the Code) and the first respondent was charged separately under s. 506 of the Code. The first respondent upon being informed that one of his sons was allegedly injured G confronted Chee He Fatt (PW7) and Doughty Paul Disimon (PW9) at the latter's shop. PW9 alleged that the first respondent had pointed the shot gun at his head and he pushed it away. PW7 also alleged that he was punched in the left eye by both the respondents when he and PW9 could not answer as to the H whereabouts of the first respondent's son. Both of them made police reports and PW7 was examined by a medical officer who testified that the injury to his eye was caused by a blunt object or by a punch to his eye. From the facts of the case it had been established beyond reasonable doubt that both the respondents I were at the scene of the crime and had confronted PW7 and PW9 to question the whereabouts of the respondent's son and

that the first respondent was armed with a shot gun and he was in a state of anger. The trial judge acquitted and discharged both the respondents when they claimed trial on the grounds that they had raised reasonable doubts in the prosecution's case by contending *inter alia* that the injury sustained by PW7 was prior to the confrontation with the respondents, that both the respondents were boxing exponents and could have inflicted severe injury to PW7 if they had punched him; that PW9's forehead would have bled due to the sharp end of the barrel of the shot gun. The prosecution appealed.

Held (allowing the appeal):

(1) The grounds taken individually or collectively are not valid grounds for entertaining a reasonable doubt on the prosecution's case. There was no evidence to justify the learned judge to find that the PW7 had sustained injury prior to the confrontation with the two respondents. Evidence of the respondents' boxing prowess was neither here nor there. The fact that they punched PW7 only once showed that their intention was not to cause severe injuries to PW7. On the evidence, there could be no doubt that the injury on PW7's left eye was caused by the first and second respondents. The record showed that the learned judge had physically examined the barrel of the gun and found that the end was not sharp as one could rub one's finger on the barrel's end and still would not get a cut. PW9's evidence was that the shot gun was only pointed at his forehead and it was not pushed violently against his forehead. The learned magistrate had mishandled the facts and had misdirected himself in the process. Having regarded the totality of the evidence and the probabilities of the case it was clear that the doubts that the learned judge entertained were not real and reasonable doubts but were mere possibilities calculated to deflect the course of justice. The trial could not be allowed to stand and ought to be set aside. (paras 23, 24, 26, 27 & 28)

(2) The penalty for an offence under s. 323 of the Penal Code is a fine not exceeding RM2,000 or to imprisonment not exceeding one year or to both fine and imprisonment. Considering all the circumstances of the case in particular the fact that PW7 had in a way provoked the first and second respondents by telling the second respondent off when he

asked where the respondent's sons were, a sentence of fine was found to be sufficient punishment for what they had done to PW7. As for the offence of criminal intimidation committed by the first respondent by putting a shotgun to PW9's head, public interest would not be served if a sentence of fine only was imposed. The punishment for the offence under s. 506 of the Penal Code is imprisonment which may extend to two years, or with fine only or with both imprisonment and fine. What the first respondent did was unacceptable and could not be taken lightly. It was done in a public place and in full view of everyone. The sentence to be effective deterrent must be severe enough to give sufficient warning to gun owners that under no circumstances should they use their weapons for an unlawful purpose. A lethal weapon was used in the commission of the offence. It was a pure display of aggression against an unarmed and helpless young man. (paras 29 & 30)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Illian & Anor v. PP [1988] 1 LNS 139 ***(refd)***
Mat v. PP [1963] 1 LNS 82 ***(refd)***
Miller v. Minister of Pensions [1947] All ER 372 ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(h)(iii)
Penal Code, ss. 323, 506

For the appellant - Salim Soib SFC, AG's Chambers
For the respondents - Zahir Shah; M/s Zahir Shah & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JC:

[1] The first respondent was charged with two offences while the second respondent was charged with one offence under the Penal Code. The joint charge against the first and second respondents is as follows:

Bahawa kamu dengan bersama-sama, pada 23 Oktober 2005, jam lebih kurang 4.00 pagi di belakang Public Bank, Pekan Dongonggon, dalam Daerah Penampang, dalam Negeri Sabah, dengan sengaja telah menyebabkan kecederaan ke atas Chee He Fatt (KP No. 611113-12-5479) dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum dibawah seksyen 323 Kanun Kesiksaan dan dibaca bersama seksyen 34 Kanun Kesiksaan.

[2] The second charge against the first respondent relates to an offence of criminal intimidation under s. 506 of the Penal Code and reads as follows:

Bahawa kamu pada 23 Oktober 2005, lebih kurang pukul 3.30 pagi di luar Café and Sports, Pekan Dongonggon, dalam Daerah Penampang, dalam Negeri Sabah, telah melakukan ugutan jenayah dengan mengancam hendak mendatangkan cedera kepada Doughty Disimon (KP No. 761108-12-5777), dengan niat menyebabkan Doughty Disimon berasa cemas dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 506 Kanun Kesiksaan.

[3] The respondents claimed trial to the charges and were acquitted and discharged by the learned trial magistrate at the end of the defence case after finding that they succeeded in raising a reasonable doubt in the prosecution case. The Public Prosecutor appealed against that decision. On 17 December 2008, I allowed the prosecution's appeal, set aside the orders of acquittal and discharge and entered convictions against the respondents for the offences they were respectively charged with. Sentence was passed on 2 January 2009. In respect of the offence under s. 323 of the Penal Code, I sentenced the respondents to a fine of RM2,000 each in default three months imprisonment. For the offence under s. 506 of the Penal Code the first respondent was sentenced to six months imprisonment. Execution of the imprisonment sentence was stayed as the first respondent indicated that he intends to appeal to the Court of Appeal. In exercising my discretion to allow stay of execution I took into account the likelihood that the Court of Appeal may not be able to hear the first respondent's appeal within six months from the date of sentencing. The time for appealing against convictions had obviously lapsed. Therefore the appeal, if any by any of the respondents would be against sentence only. I indicated to the parties on 17 December 2008 that I shall give my grounds of decision in due course and I do so now. For the sake of clarity I shall deal with the charges separately.

The Charge Under s. 323 Of The Penal Code

[4] The prosecution case is as follows. On 23 October 2005 at about 3am the victim Chee He Fatt (PW7) was at the Golden Palace Karaoke when he received a call from Doughty Paul Disimon (PW9) asking for help in connection with a fight at SJD Café owned by PW9. He proceeded to SJD Café which was located in Dongonggon town. On arrival he parked his car behind the Public Bank and right behind SJD Café. He went to see PW9 who was waiting outside. PW9 told him to wait for a while as he was closing the Café. It was at this time that a double cab vehicle arrived. The time was around 3.30 to 4am. One Petrus Mojuntin who is the first respondent's son came over to where PW7 was and demanded to know where his younger brother was. PW7 replied he did not know and told him to look for his brother himself. Then the first respondent arrived in a Land Rover. He was wearing a sarong, barefooted and armed with a shot gun. The first respondent also demanded to know where his son Junior was. PW7 answered he did not know. PW7 was then pulled by the shirt by Gregory and Mitchell who were the first respondent's nieces. They had joined the first and second respondents to the Café. PW7 was pulled to a lane behind SJD Café and held against the wall. The first respondent then punched PW7 in the left eye with his right hand while his left hand was holding the gun. This was followed by another punch by the second respondent, also in the left eye. PW7 felt pain but did not fight back. After being punched he walked to his car. Then a police patrol car arrived and PW7 was brought to the Police Station where he lodged a report at 4.20am. The following is his report:

> Pada 23/10/2005 jam 0400 hrs, bertempat di belakang Public Bank, Pekan Dongonggon saya telah dipukul di bahagian mata dengan tangan oleh dua orang lelaki penama Datuk Conrad Mojuntin dan anak buahnya. Saya dipukul tanpa sebab dan Datuk Conrad memegang selaras senapang semasa memukul dibahagian mata saya. Akibatnya mata saya lebam. Laporan ini dibuat untuk tindakan lanjut takut terjadi apa-apa kepada saya dikemudian hari.

[5] PW7's report was taken by Woman Constable Enja ak Ayum (PW2). According to PW2 when PW7 lodged the report he had a bruise on his eye but she was not sure which eye. She described the bruise as "lebam".

[6] PW7 was asked in cross examination what he meant when he said in his report "Saya dipukul tanpa sebab". PW7's answer was that they held him and assaulted him for no reason.

[7] The driver of the police patrol car who arrived at the scene soon after the incident was Lance Corporal Tony ak Rapan (PW5). His testified that at about 3am on 23 October 2005 he was on patrol duty with Lance Corporal Marcellus Gamiun when he received a telephone call from someone informing him that there was a fight at SJD Café. He rushed to the scene and when he arrived he saw many people gathering at the place. Among them were the first and second respondents. The first respondent was walking back and forth and holding a shot gun. He was angry and shouted "Kenapa polis lambat sampai. Anak aku kena tikam. Ampai-ampai di hospital." As for the second respondent PW5 said he was "bersilat" and challenging PW5 to a fight by saying "Mahu fight ka?" Lance Corporal Marcellus came over to calm the situation. The first and second respondents then left the scene. In cross examination it was put to PW5 that PW7 was shouting when he was at the scene. PW5 disagreed.

[8] PW7 was examined by Dr. Noor Hafizah Mat Salleh (PW4) on the same day. She testified that on examining PW7 she found haematoma in PW7's left eye which was a reddish discolouration over the conjunctiva as a result of broken capillary. According to her the injury was sustained one or a few hours earlier and was caused by a blunt object or a punch. In re examination she testified that the injured area would turn bluish after one day. In cross examination it was suggested to her by counsel that PW7 was not in pain but she disagreed.

[9] The investigation officer of the case, Sargeant David Jamilong (PW6) testified that before the investigation paper was opened PW7 did come to his office on the morning of 23 December 2005 after lodging the police report. When PW7 came to see him PW6 noticed that PW7's left eye was "lebam". He asked PW7 what happened and PW7 told him he was punched at the SJD Café by the first and the second respondents. He advised PW7 to go to the Queen Elizabeth Hospital which PW7 did.

[10] On the strength of these evidence the learned Magistrate found, and rightly so in my view that the prosecution had established a *prima facie* case against the two respondents. It is clear that PW7's evidence is corroborated by medical evidence (PW4), the testimonies of PW2, PW5, PW6, PW9 and his police report.

First Respondent's Defence

[11] In his defence the first respondent denied ever punching PW7. His version of the incident is that on the night of 22 October 2005 he was at home with his family members preparing for his eldest daughter's wedding when suddenly a car came to a screeching halt in front of his house. Out came Alex who was a family friend. He jumped over the railing of the balcony and shouted in panic saying Malindo Arau had been shot. At the same time Malindo Arau came by the gate with a metal sticking out from the left side of his abdomen and was in pain. He had been hit by a flying duster. Alex told the first respondent that his two sons were chased by masked men wielding a samurai sword and iron rods and that it happened behind SJD Café. In a state of shock and worry the first respondent told his eldest son Petrus to go and look for them. He followed later arming himself with a shot gun with two bullets. His intention of bringing the gun according to him was to protect himself, his family and his friends. Before leaving the house he asked Gregory and Mitchell to call the police. Then they went straight to SJD Café which was about one kilometer away. At SJD Café he confronted PW9 and asked him where his sons were but PW9 did not answer. I shall deal in more detail on the incident involving PW9 when I deal with the offence under s. 506 of the Penal Code in a while. After confronting PW9 the first respondent turned his attention on PW7. He asked PW7 the same question he asked PW9 but PW7 too did not answer. Instead according to the first respondent PW7 stared at him with "fierce eyes". He denied punching PW7. Towards the end of his examination in chief however the first respondent said he never met PW7 behind Public Bank that morning, in obvious contradiction of his own earlier evidence. He told the court that being a boxer himself PW7's eyebrow would have split if he had punched him. The first respondent further testified that the second respondent also did not punch PW7. According him the second respondent was a welder and very strong and that if he had punched PW7 his eye ball would come

out. In cross examination the first respondent told the court that other than being a boxer, he was also a martial artist and a Tai Chi expert holding black belt. He also said he knew how to give a good box, undercut, jab and hook. The first respondent certainly came with impressive credentials when it comes to martial arts and boxing.

Second Respondent's Defence

[12] His evidence is that on arrival at SJD Café, other than asking PW7 where the first respondent's two sons were he did not do anything else to PW7. He denied punching PW7 in the eye and said he saw nothing unusual in PW7's face when they left the scene. He said PW7 was angry when he spoke to him. In cross examination the second respondent testified that he had no misunderstanding with PW7 but disagreed that PW7 had no reason to fix him up.

[13] The defence called nine witnesses, all close family members, to support their case. The first witness was Evan Conrad Mojuntin (DW3) who is the first respondent's son. His testimony is that when he and the other family members proceeded to SJD Café that early morning he was expecting the worst as the Dongonggon area was notorious. So far as the incident involving PW7 is concerned the only relevance of DW3's evidence is that when they were about to leave the Police Station he saw PW7 at the entrance of the Station and saw nothing wrong with his face. The next witness was the other son of the first respondent Moses Conrad Mojuntin (DW4). His evidence concerns his fight with a person by the name of Kadok prior to the incident involving PW7. His evidence is therefore irrelevant as far as the offence under s. 323 of the Penal Code is concerned. Obviously he was not present when the incident took place. The next defence witness was Conrad Junior Mojuntin Jomilun (DW5). He is also the son of the first respondent. He evidence too was on the fight between DW4 and Kadok and of him and DW4 being chased by three persons armed with a samurai sword and an iron rod. The fifth witness was Barry J Ligunjang (DW6). His evidence was also on events prior to the arrival of the first and second respondents at the scene. The seventh witness Emil Gou Balan (DW7) also talked about the earlier incident. His evidence is therefore irrelevant as well. The eighth witness was Malindo Lawrence Aduk (DW8). He was the one who had a flying duster

stuck in his abdomen and who informed the first respondent that his two sons were chased by the masked men. He had earlier been involved in a fight at SJD Café. The only other material part of DW8's evidence is that when he met PW7 at the Police Station he saw nothing unusual on PW7's face. Instead according to him PW7 was fine. The next witness called by the defence was Mitchell Mojuntin (DW9). The first respondent is his uncle while the second respondent is his brother. He was also one of those who went to SJD Café together with the first and second respondents. He said that when they arrived at the Café he confronted PW7 straight away and held him by the collar. He asked PW7 where Junior and Moses were but instead of giving an answer PW7 shouted at him with angry eyes ("mata yang marah") and told him to look for them himself. He denied that the first and second respondents punched PW7 as PW7 was being held by him. The tenth witness was Gregory Mojuntin (DW10). The record at p. 86 of the notes of evidence shows that he was wearing a sports attire when giving evidence in court. The first respondent is his uncle as he is the elder brother of DW9. The second respondent is his brother. He testified that when they were at SJD Café there was a commotion and some people were going towards PW7. He said he asked PW7 something but did not say what it was that he asked. DW10 went on to say that PW7 tried to resist but as there were a few people there he was unable to do so. However he did not say what he meant by "resist". He denied holding PW7 by the shoulder and pulling him to the back of the shop and holding him against the wall. He denied that the first and second respondents punched PW7 in the eye. He said he did not see anybody punching PW7 that morning. The last defence witness was Petrus Conrad Mojuntin (DW11) another son of the first respondent. He started off by informing the court that he represented Sabah in boxing in 1999 and had a gym at home. The gym consisted of equipment, body building, boxing and punching bag. DW11 testified that when they returned home from SJD Café on the morning of 23 December 2005 there were no injuries on his father's hands. He said that at SJD Café PW7 was shouting angrily and was aggressive. He said he was taken aback by PW7's behavior and tried to approach him but his way was blocked by a few people, including PW9. When he asked PW7 where his brothers Moses and Junior were PW7 replied "saya tak tahu saya tak peduli". Then Alex came over and a scuffle broke out between Alex and two other guys. DW11

however did not say a word about the incident involving his father and the second respondent and PW7. The only notable part of his evidence in relation to the offence under s. 323 of the Penal Code is that when he met PW7 at the Police Station that morning he did not see anything wrong with PW7's face.

The Charge Under s. 506 Of The Penal Code

[14] The testimony of the complainant Doughty Paul Disimon (PW9) is that on 23 December 2005 at about 3am he was closing his shop when the first respondent and his sons, nieces and friends came to confront him. The first respondent pointed a shotgun at his head and demanded to know where his son was. PW9 replied he did not know. The first respondent then asked PW9 if he was the son of Jommitod and PW9 replied yes. PW9 then pushed away the barrel of the gun away from his head. The first respondent's reaction to this was to hit PW9's neck with the barrel of the gun. PW9 was then pulled by the shirt by the first respondent's niece with the intention of assaulting him. Fortunately according to PW9 a police patrol car arrived and the policemen told the first respondent and his company to go home and they left the scene. PW9 said that when the gun was pointed at his head he feared for his life. The words he used to describe his state of mind were "Saya takut bila-bila mati." PW9's evidence that the respondent pointed the gun at his head is corroborated by PW7 who witnessed the incident himself. According to PW7 only the first respondent was holding a gun at the time. In his police report which he lodged at 11.30am on the same day this is what PW9 told the police:

> Pada 23/10/2005 jam lebih kurang pukul 3.30 a.m. semasa saya selesai menutup kedai SJD Café and Sport Pekan Dongonggon, Penampang tiba-tiba tiga buah kereta berhenti di kedai saya dan lebih kurang sepuluh atau lima belas orang meluru ke arah saya dan menolak saya dan salah seorang yang saya kenali sebagai Datuk Conrad Mojuntin mengacu senapang ke arah kepala kanan saya sambil bertanya "dimana itu orang" lepas itu saya menolak senapang dari kepala saya. Saya buat laporan untuk tindakan pihak polis.

[15] Prior to the incident PW9's evidence is that his cashier by the name of Elizabeth Mojonggun had called him telling him that there was some problem at SJD Café. On hearing that he walked to the Café and on arrival he saw people running helter skelter

("bertempiaran"). He asked Elizabeth what happened and was told that there was a fight. So PW9 called PW7 for assistance but PW7 took a long time to arrive. According to PW9 the first respondent's son Ivan was already at the scene together with his nieces Gregory, Mitchell, Alexander Sylvester Chuan and David. PW9 said he was at the back of SJD Café when the first respondent pointed the gun at his head. In cross examination PW9 said he did not know why the first respondent pointed the gun at his head. He also did not know at that time that somebody had chased the first respondent's son Moses with a sword. In further cross examination PW9 said the barrel of the gun actually came into contact with his head when it was pointed at him.

[16] On the evidence the learned Magistrate was right in calling for the first respondent to enter his defence. PW9's evidence is corroborated by PW7, his police report and the surrounding circumstances of the case.

First Respondent's Defence

[17] The first respondent's version of the incident is as follows. When he arrived at SJD Café the people around him were angry with him. He did not explain however what they were angry about. He said he held the gun with the barrel upfront four feet away from PW9. He asked PW9 where his sons were but PW9 did not answer. He was confused. He said PW9's eyes were "calculating" and "can kill" and was not frightened of him. According to him there were five to six people around PW9. He said it was impossible for him to point the gun at PW9's head as he was standing four feet away. He added that if indeed he had placed the barrel of the gun on PW9's head for two minutes as claimed by PW9 his forehead would have bled due to the sharp end of the barrel. As for PW9's claim that he pushed away the gun, the first respondent said if that was true PW9's head would have been bruised due to the holding. The first respondent went on to deny that he hit PW9 on the neck with the barrel of the gun after PW9 pushed it away. He explained that he weighed 90 kilograms since he was 20 years old and quite fit and that if he were to hit PW9 in the neck which according to him is the "death point" PW9 would have collapsed. The first respondent further testified that when he asked PW9 on the whereabouts of Moses and Conrad he was asking PW9 in a nice way. However when asked in cross examination if it is true that he had asked

PW9 in an angry and demanding voice he did not answer the question. He again did not answer when asked if his manner of questioning was intimidating to PW9. The first respondent said he was angry and worried when he saw PW9's eyes. In re examination he was asked how he felt when PW9 did not answer his question. His answer was "I was disappointed, sad and left him." He said even though PW9 did not answer him he had no intention to intimidate, threaten or harm him.

[18] In support of his father's defence DW3 testified that his father held the barrel of the gun upwards and did not see him placing it at PW9's forehead. The other witness who testified on the incident was DW8. He said the first respondent only spoke to PW9 for less than a minute and was holding his gun pointing up. He did not see the first respondent placing his gun at the forehead of PW9. The next material witness called by the defence was DW9, the first respondent's niece. He testified that at no time did his uncle point the barrel of the gun at PW9's head. However he confirmed PW5's evidence that when the two policemen arrived at the scene the first respondent scolded them for arriving late. The next witness, DW10's evidence regarding the incident is that when the first respondent talked to PW9 his gun was pointing upwards. He said he did not see the first respondent pointing the gun at PW9's head. However his answer in cross examination shows he was unsure if the first respondent did or did not point the gun at PW9's head. When asked if he saw the gun being pointed at PW9 his answer was "tidak nampak, mungkin."

[19] At the close of the defence case what was established beyond any reasonable doubt is that the two respondents were at the scene of crime and had confronted PW7 and PW9 on the whereabouts of the respondents' two sons. It was also established beyond any reasonable doubt that the first respondent was armed with a shot gun and was in a state of anger. A close scrutiny of the defence case reveals that they are nothing more than bare denials of the offences charged. It is obvious that they were tailored to contradict whatever damaging evidence PW7 and PW9 had given against them. This in my view is not sufficient to dislodge the *prima facie* case established against each of them by the prosecution. It is implicit in s. 173(h)(iii) of the Criminal Procedure Code that once a *prima facie* case is established against an accused person he must rebutt or explain the case made out against him. If he remains silent he must be convicted:

Balachandran v. PP [2005] 1 CLJ 85. If he gives an explanation the explanation must stand up to logic and reason having regard to the whole evidence. By calling for the defence the learned Magistrate must have accepted PW7's and PW9's evidence in all material respects. To justify a u-turn on this finding there has to be something in the defence explanation which having regard to all the circumstances of the case has thrown a real and reasonable doubt on their testimonies.

[20] It is trite law that the accused has no duty to prove or to disprove anything. All he needs to do to entitle him to an acquittal is merely to cast a reasonable doubt on the prosecution case: *Illian & Anor v. PP* [1988] 1 LNS 139. In *Mat v. PP* [1963] 1 LNS 82 Suffian J (as he then was) gave the following guidelines for magistrates to apply:

> The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If on the whole evidence you are left in a **real state of doubt,** the prosecution has failed to satisfy the onus of proof which lies upon it. (emphasis added)

What then is the degree of proof required to establish a case beyond reasonable doubt? In *Miller v. Minister of Pensions* [1947] All ER 372 Denning J provided the following answer:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

In *PP v. Saimin & Ors* [1971] 1 LNS 115 Sharma J said:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence

leaves the mind of the juror in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

[21] I am mindful of the principle that an appellate court will be slow to interfere with findings of facts made by the trial court especially where they involve the question of the credibility of the witnesses. The test for appellate intervention is laid down by the Court of Appeal in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 as follows:

Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or reject the evidence of a witness, test it against relevant criteria. Thus he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[22] In other words the appellate court will only interfere if there had been insufficient judicial appreciation of the evidence by the trial court. In the instant case the evidence of assault and intimidation came directly from the victims themselves. The question before the learned trial magistrate was a simple one of whether the incidents took place or otherwise. No complicated issues of fact were involved. By finding that a *prima facie* case had been established clearly the learned magistrate was satisfied that they did take place. What was it in the defence explanation that led the learned magistrate into having second thoughts about their evidence which he had earlier accepted? From the grounds of decision it is clear that he was guided by the following factors:

(1) The policewoman (PW2) who took PW7's police report was unable to tell which eye was "lebam" and had also failed to explain what she meant by "lebam".

(2) The doctor (PW4) who examined PW7 did not say that PW7's eye was "lebam". According to the learned magistrate the word "lebam" conjures up images of Dato' Seri Anwar Ibrahim's black eye after he was whacked senseless by the Inspector General of Police.

(3) Neither the investigation officer nor the Medical officer made any sketch plan or took photos of the injuries suffered by PW7.

(4) PW9, Doughty Paul Disimon did not explain the nature of the earlier commotion at SJD Café and the persons involved. According to the learned magistrate PW7's and PW9's involvement in the earlier commotion cannot be discounted. He said the injury suffered by PW7 and PW9 could have been caused during the earlier commotion where PW7 and PW9 were "possible active participants."

(5) No chemist report on urine and blood samples were taken from the first and second respondents to confirm if they consumed alcohol at the material time.

(6) Having regard to the first and second respondents' boxing skills and training the injury suffered by PW7 would have been more severe if it was them who caused it.

(7) The investigating officer failed to examine the hands and fists of the first and second respondents to see if there were injuries to support the prosecution case that they punched PW7.

(8) There was no medical report on the injury suffered by PW9. According to the learned magistrate this was necessary because PW9 alleged that he was hit in the neck with the barrel of the gun after he pushed it away.

(9) The investigation officer (PW6) failed to explain what transpired between the evening of 22 October 2005 at around 10pm and the morning of 23 October 2005 at around 3am at the premises of SJD Café. This according to

the learned magistrate resulted in a gap in the period between 23 October 2005 and 12 January 2006 which lessened the evidentiary value of the investigation.

(10) The prosecution failed to call Elizabeth Mojonggun to "nullify" PW7's and PW9's involvement in the earlier fighting incident at SJD Café.

[23] With due respect to the learned magistrate none of the above grounds taken individually or collectively are valid grounds for entertaining a reasonable doubt on the prosecution case. In the first place there is no evidence that PW7 was involved in the earlier fight at SJD Café to justify the learned magistrate's finding that PW7's injury could have been sustained during that incident. PW9's evidence is that when PW7 arrived at SJD Café he was about to close shop and the fight was over. In this connection the evidence of DW4, a defence witness is pertinent. He was involved in the earlier fight and he did not mention PW7's involvement. The only names he mentioned were Conrad Junior, Titi, and Kadok. He said the exchange of punches were between him and Kadok. This was confirmed by his elder brother DW5 who testified that shortly after he arrived at SJD Café he heard a commotion outside the Café and when he went out to check he saw his younger brother DW4 trading blows with Kadok. Not long after that he saw Titi holding a long samurai sword and Kadok taking an object from his car. Titi was shouting and running towards DW4 with a samurai sword. DW5 said there was panic and everybody started to run away including himself and DW4. Such being the case and in the light of PW7's evidence that the injury on his left eye was caused by the first and second respondents the learned magistrate was wrong to find that PW7 could have sustained the injury during the earlier incident.

[24] The learned magistrate also accepted the defence contention that having regard to the boxing skills of the first and second respondents the injury inflicted on PW7 would have been more severe if indeed it was caused by them. With due respect evidence of the respondents' boxing prowess is neither here nor there. The fact that they punched PW7 only once each shows that their intention was not to cause severe injuries to PW7, certainly not to cause his eyeball to come out. They could if they had wanted to though. Anyway you do not have to be a trained boxer to

A cause one's eyeball to come out. On the evidence there can be no doubt that the injury on PW7's left eye was caused by the first and second respondents.

[25] As for the learned magistrate's suggestion that PW9 could B also have been injured there is no basis for that suggestion. PW9 never said he was injured after being hit in the neck with the barrel of the gun by the first respondent. In fact his evidence is that it was not a hard hit and did not cause much pain. If the learned magistrate had in mind the earlier fighting incident as C reason to suspect that PW9 had probably sustained some kind of injury he is again wrong because there is no evidence that PW9 sustained any injury at all. The evidence shows that only PW7 was injured.

D **[26]** In dealing with the first respondent's defence on the charge under s. 506 of the Penal Code, the learned magistrate has not made it clear how the first respondent's explanation has cast a real and reasonable doubt on the prosecution case having regard to the whole evidence. No reason was suggested as to why PW9 E would invent such serious allegation against the first respondent who is his own uncle. The defence made an issue of PW9's claim that the first respondent pointed the gun at his head for two minutes. According to the first respondent if indeed he had placed the barrel of the gun at PW9's head for two minutes PW9's F forehead would have bled due to the sharp end of the barrel. Was the end of the barrel sharp? In this connection the record at p. 191 of the notes of proceeding is relevant. The record on that page shows that the learned magistrate physically examined the barrel of the gun and found that the end was not sharp as one G could rub one's finger on the barrel's end and still would not get cut. This should have alerted the learned magistrate of the first respondent's inclination to embellish evidence to suit his case and to be wary of his evidence. Instead the learned magistrate considered this fact as favourable to the defence by saying that H even though the barrel of the gun was not sharp the action of the first respondent in pointing the gun at PW9's head "would result in some markings or recognisable effect on the skin due to the violence and pressure." Actually PW9 did not say the gun was pointed at his head for two minutes. What he said was "02 minit I begitu". His evidence on this point must not be considered in isolation. He had earlier testified as follows:

Dia acu senapang ke kepala saya. OKT1 tanya dimana anak saya. Saya cakap tidak tahu. OKT1 kata kau anak Jommitod kan? Saya kata ya. Kemudian saya tolak barrel.

[27] In his police report PW9 also said he pushed away the gun after he was questioned by the first respondent. The questioning and the pushing away of the gun could not have taken two minutes. This is common sense. The real issue is whether or not the gun was pointed at PW9's head, not how long exactly was it pointed at him. After all it was only an estimate and witnesses do make mistakes in recalling events. In the absence of evidence that PW9 was deliberately lying on this point the issue should not have been given such prominence by the learned magistrate. In any event PW9's evidence is that the gun was only pointed at his forehead. He did not say it was pushed violently against his forehead. It is clear that the learned magistrate had mishandled the facts and had misdirected himself in the process. There is no doubt that this was a major factor that led him into having doubts on the prosecution case.

Conclusion

[28] Having regard to the totality of the evidence and the probabilities of the case it is clear to me that the doubts that the learned magistrate entertained were not real and reasonable doubts but were mere possibilities calculated to deflect the course of justice. For reasons stated above the judgment of the trial court cannot be allowed to stand and ought to be set aside.

Sentence

[29] The penalty for an offence under s. 323 of the Penal Code is a fine not exceeding RM2,000, or to imprisonment not exceeding one year or to both fine and imprisonment. Considering all the circumstances of the case in particular the fact that PW7 had in a way provoked the first and second respondents by telling off the second respondent when he asked where Moses and Junior were I considered a sentence of fine to be sufficient punishment for what they had done to PW7.

[30] As for the offence of criminal intimidation committed by the first respondent I do not think public interest will be served if a sentence of fine only is imposed as urged upon me by learned counsel. The punishment for the offence under s. 506 of the

Penal Code is imprisonment which may extend to two years, or with fine only or with both imprisonment and fine. It is well established principle that the public interest must override all other considerations in passing sentence. What the first respondent did is unacceptable and cannot be taken lightly. It was done in a public place and in full view of everyone present including his son and nieces. Instead of showing them a good example he showed them how to take the law into their own hands. In his evidence PW9 said he feared for his life when the gun was pointed at his head. Who would not, given the volatile situation and the state of mind of the first respondent. It is obvious that he was a very angry man at the time. Even the police were not spared his anger. When PW9 pushed away the gun from his head he hit PW9's neck with the barrel of the gun. It was fortunate that the police patrol car arrived in time. Otherwise worse things could have happened to PW9. Learned counsel echoed back the first respondent's evidence that his intention in bringing the gun was solely to protect himself, his family and his friends. That is contradicted by his act of pointing the gun at PW9's head. There was no threat or provocation coming from PW9. It was a pure display of aggression against an unarmed and helpless young man. What happened at Dongonggon town that early morning is a picture of lawlessness not unlike the cowboy days of a bygone era. The sentence to be effective deterrent must be severe enough to give sufficient warning to gun owners that under no circumstances should they use their weapons for an unlawful purpose. I have taken into consideration the fact that the first respondent had a clean record prior to this conviction and that he is 60 years old. But I must also take note of the fact that a gun, a lethal weapon, was used in the commission of the offence. Further, the respondent has not shown any remorse. In his defence he tried to portray PW9 as a congenital liar and an aggressive person with eyes that can kill in an attempt to discredit PW9 when in fact it was he himself who was the aggressor. A man of his age and should have shown more restraint. Instead he totally lost control of himself. He could have killed PW9 if he had retaliated.